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Margaret Butler

Georgia State University College of Law, mbutler@gsu.edu

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Gender Identity and Domestic Legal Status

Margaret (Meg) Butler*

Legal recognition of self-identification is a core concern for gender-nonconforming and transgender people, and this chapter includes scholarship related to that legal recognition. Legal recognition of identity may manifest in both the updating of legal documents such as birth certificates, Social Security records,¹ driver licenses or state identification cards, etc., to reflect correctly the petitioner's gender designation. It may also manifest, for example, in a petition to change one's name.

Scholarship in this area generally takes up the challenge of advocating for the simplification of such change processes. Authors such as Brian T. Ruocco, raise challenges to the need for government classification of gender and the role that such classification plays in society. Finally, some scholars, such as Dean Spade, note additional complications arising from laws such as the REAL ID Act and others. This chapter also includes annotations for law review articles that generally address issues arising from or focusing particularly on identity, rather than describing specific claims (such as Title IX) or particular laws (such as the Patient Protection and Affordable Care Act). For example, articles addressing whether sex reassignment surgery (SRS) is or should be required to correct gender markers are found in this chapter, while articles addressing the agency of a person to seek medical treatment for gender dysphoria would be found in the chapter regarding gender identity and health.

To the degree that scholarship focuses on the gender identity of the spouses, rather than the sexuality of the spouses, annotations regarding marriage are found here. For those interested in studying the law of marriage and families, it may also be worth reviewing the annotations in

* Associate Director for Public Services at Georgia State University College of Law Library.

¹ On June 14, 2013, the Social Security Administration (SSA) announced a policy that allowed transgender people to amend their Social Security records to reflect their gender correctly. *Administrative Law-Identity Records-Social Security Administration Eliminates Surgical Requirement for Changing Trans Individuals' Gender Markers.-Soc. Sec. Admin., Program Operations Manual System, Rm 10212.200 Changing*, 127 HARV. L. REV. 1863, 1870 (2014) citing Soc. Sec. Admin., Program Operations Manual System, RM 10212.200 Changing Numident Data for Reasons Other than Name Change (2013).

the chapter addressing gender identity and family law as well as the chapters addressing sexuality and family law.

Similarly, this chapter's scope does not include articles regarding religious freedom claims; annotations of articles regarding those claims may be found either in the general gender identity chapter or in chapters addressing sexuality and religious freedom laws.

During the time covered by this bibliography, scholarship focused on procedural aspects of correcting legal documents to reflect one's gender at the state level and also in various federal contexts. Scholarship also addresses gender theory, including issues such as the effects of legislating gender and maintenance of records of gender by governmental entities. Future scholarship in this area may continue the gender theory conversation, for one. Scholarship may continue to explore ways in which gender is determinative of rights and privileges under the law.

To perform research in this area, there are several approaches to take. One approach would be to consult the websites of legal advocacy organizations, such as the Sylvia Rivera Law Project, Transgender Law Center, or the National Center for Transgender Equality. Some states also have their own organizations that provide information.

Using a free search tool such as Google, begin with terms such as *transgender* or *gender identity*, and then add terms representing a second concept. The second concept may be narrow, such as *name change* or *correct birth certificate* or broader such as *correct identity documents*. Possible concepts to consider include *legal status*, *gender marker*, *equal protection*, *vital statistics*, and *gender reclassification*.

Using a library catalog that follows the Library of Congress system for organizing books, it is possible to search by subject. Subject searching helps to quickly identify books that are primarily about specific subjects, whereas word searching identifies items which contain the word(s) searched. Subjects that may be helpful for research in this area include:

- Transgender people--Civil rights
- Transgender people--Identity
- Transgender people--Legal status, laws, etc.
- Transgender people--Political activity
- Transsexuals--Political activity; Sex and law

Appell, Annette R., *Certifying Identity*, 42 CAP. U. L. REV. 361–405 (2014).

The birth certificate document describes or defines identity and entitles the holder to certain corresponding rights, including those of citizenship.

Appell demonstrates that the birth certificate creates identity without the consent of the individual, describes the connection between the birth certificate and the rights of its holder, and challenges the birth certificate's identity categories including race, sex, and gender as well as its role as a "family creator and gatekeeper" (396). Appell's suggestions include revising the birth certificate regime to disaggregate birth registration data from the certificate, allowing individuals to later register their self-defined identities on the certificate.

Dubois-Need, Leslie & Amber Kingery, *Transgendered in Alaska: Navigating the Changing Legal Landscape for Change of Gender Petitions*, 26 ALASKA L. REV. 239–70 (2009).

According to the authors, correction of gender markers in Alaska is on the rise and is treated inconsistently by Alaska courts. The authors seek to remedy that situation and provide an overview of the process in Alaska. They describe other states' policies and evaluate the law of Alaska, including its constitutional equal protection and right to privacy guarantees, in order to demonstrate that Alaska courts may grant gender marker correction petitions without requiring genital sexual reassignment surgery. The authors briefly discuss the REAL ID Act of 2005 and also the implications of the Defense of Marriage Act (DOMA) on transsexual marriage validation and termination.

Johnson, Jenna, *Minnesota (Trans)gender Markers: State Statutes and Policies on Amending Identity Documents*, 41 WM. MITCHELL L. REV. 213–38 (2015).

Minnesota was the first state in the country to include nondiscrimination regarding the amendment of birth certificates to correct gender markers. Johnson reviews the laws and policies in Minnesota regarding a variety of changes such as of name, birth certificate, driver's license, and passport.

Koenig, Jonathan L., *Distributive Consequences of the Medical Model*, 46 HARV. C.R.-C.L. L. REV. 619–45 (2011).

Using a variety of hypothetical transgender experiences, Koenig demonstrates that the medical model, or the understanding of transgender identity as one which requires medical treatment (including hormones and/or gender-confirming surgery), forms a basis for conflict among transgender rights activists. Further, Koenig articulates ways in which

the medical model has distributive effects, discussed in the contexts of health care, identity documents, education, family, and employment. Ultimately the medical model should be used on a limited basis, Koenig argues.

Levasseur, M. Dru, *Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science Is Key to Transgender Rights*, 39 VT. L. REV. 943–1004 (2015).

Levasseur, a transgender civil rights litigator, contributed to the symposium issue *Recognizing Injustice: From Social Movements to Legal Reform* with explicit goals of raising awareness about the importance of understanding gender identity and “amplify[ing] the humanity of transgender litigants” (947). Levasseur provides a survey of areas of law in which the courts’ determination of “sex” have dehumanized transgender people and have been inconsistent with medical authority, including marriage/custody and employment discrimination. Recent action by the Department of Education forms the basis of Levasseur’s argument that Title IX has been “finally properly interpreted . . . to protect transgender litigants” (991). Ultimately, Levasseur notes that gender identity is a primary biological determinant of sex, and that courts should recognize that in respecting transgender peoples’ legal rights, including that of privacy.

Levi, Jennifer & Daniel Redman, *The Cross-Dressing Case for Bathroom Equality*, 34 SEATTLE U. L. REV. 133–71 (2010).

The need for access to bathrooms is universal. Levi and Redman first provide historic context for the debates about bathroom equality. They follow with an analysis of case law regarding bathroom discrimination, focusing on the arguments raised including risk of fraud or crime; enforcing normative gender behavior and discouraging homosexuality; and rationalizing the denial of access regardless of existing nondiscrimination laws protecting gender identity. The same types of arguments were unsuccessfully raised to defend anti-cross-dressing laws, and Levi and Redman argue that the arguments used in opposition to the anti-cross-dressing laws should be used to support bathroom equality.

Markowitz, Stephanie, *Change of Sex Designation on Transsexuals’ Birth Certificates: Public Policy and Equal Protection*, 14 CARDOZO J.L. & GENDER 705–30 (2008).

Written prior to the *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), decision, Markowitz argues that the inconsistent state laws regarding correction of birth certificates to reflect postoperative transsexuals consistently with their identities implicates equal protection issues. Markowitz's discussion of how various jurisdictions treat the correction of birth certificates includes foreign cases. Markowitz also includes an equal protection analysis of sex-classification rules and state requirements regarding genital reconstructive surgery. In conclusion, Markowitz suggests that public policy dictates that gender marker correction should be made by courts in reliance upon both medical opinion and the opinion of the transsexual.

Mottet, Lisa, *Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People*, 19 MICH. J. GENDER & L. 373–470 (2013).

Mottet, in this heavily cited article, provides an overview of the law regarding the reflection of gender on birth certificates, including discussion of the Model State Vital Statistics Act (MSVSA), correction of gender markers on birth certificates, and description of the ways that gender designation is legally significant in peoples' lives. Further, Mottet criticizes the surgery requirement often levelled at those who want to correct their gender markers and makes suggestions. Surgical requirements should be eliminated in favor of the process described in Mottet's suggested model law, and privacy should be protected, such as by blocking access to original birth certificates when they have been updated.

Parsi, John, *The (Mis)categorization of Sex in Anglo-American Cases of Transsexual Marriage*, 108 MICH. L. REV. 1497–1526 (2010).

In this note, Parsi describes the legal treatment by the United Kingdom and the European Court of Human Rights of post-operative transsexuals' acquired sex. Parsi observes that the UK's and ECHR's legal reasoning recognizes transsexuals' acquired sex and suggests that the same legal reasoning be "imported into the United States to unite the state court split in favor of recognizing the acquired sex of a post-operative transsexual" (1501).

Rose, Katrina C., *Is the Renaissance Still Alive in Michigan? Or Just Extrinsic? Transsexuals' Rights after National Pride at Work*, 35 OHIO N.U. L. REV. 107–54 (2009).

Noting that in 1978 Michigan explicitly recognized that transsexuals exist by virtue of a law authorizing the change of gender markers on birth certificates, Rose analyzes the 2004 Michigan constitutional amendment limiting marriage to heterosexual couples. The analysis includes discussion of the ways in which other states have treated birth certificate laws and the relationship between defense of marriage laws and laws regarding birth certificates. Rose critiques the conflation of the homosexual body, and its concomitant regulation in marriage law, with the transgender body.

Ruocco, Brian T., *Our Antitotalitarian Constitution and the Right to Identity*, 165 U. PA. L. REV. 193–226 (2016).

Ruocco identifies ways in which the United States Constitution places limits on totalitarianism by the federal government, such as by providing for substantive due process and offering First Amendment protections. Gender identity laws, including those that mandate gender documentation and govern the reclassification of gender, serve to appropriate identity in violation of the Constitution. Ruocco offers a strategy for constitutional challenges by transgender people to assert antitotalitarian gender identity and right to identity claims. In conclusion, Ruocco advocates for the limitation or elimination of the use of legal gender and allowing individuals to self-determine their own gender.

Spade, Dean, *Documenting Gender*, 59 HASTINGS L.J. 731–842 (2008).

Written by a leading scholar on this subject, this is the most heavily cited article on the subject of gender reclassification. Spade considers first the historic development of identity documents and their role in the development of modern governments. Next, Spade describes the variety of jurisdiction-based rules in the United States that exist regarding gender correction or reclassification, noting additionally the War on Terror's impact on identification requirements. Spade challenges the assumed value of gender classification and argues that the collection and maintenance of that data should be minimized. The article includes several figures and appendices addressing DMV requirements for gender reclassification and birth certificate requirements for gender reclassification.

Staver, Mathew D., *Transsexualism and the Binary Divide: Determining Sex Using Objective Criteria*, 2 LIBERTY U. L. REV. 459–519 (2008).

Written before the *Obergefell* decision, Staver observes that marriage was expressly limited to heterosexual couples and argues that “sex is an immutable characteristic determined at the time of birth” (472). Staver maintains that sex-change surgery should not be recognized for purposes of determining marriage eligibility. Staver provides a survey of the laws of Florida, Kansas, Ohio, New York, and Texas, arguing that the laws of the states did not authorize marriage. Staver’s ultimate argument is that “sex reassignment surgery does not change a person’s sex” (490).

Vade, Dylan, *Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender That Is More Inclusive of Transgender People*, 11 MICH. J. GENDER & L. 253–316 (2005).

Vade, a co-founder of the Transgender Law Center, examines the concept of gender and the medical and legal distinction between “sex” and “gender,” noting the ways in which the dominant interpretation of gender leads to practices, policies, and laws. In this heavily cited article, Vade proposes “a non-linear view of gender” (261) and proposes suggestions, such as no longer relying upon the “sex” and “gender” distinction and explicitly recognizing the nature of birth-assigned gender. Individuals should be able to self-identify their gender, according to Vade. The author includes a list of terms and definitions.

Vanderhorst, Blaise, *Whither Lies the Self: Intersex and Transgender Individuals and a Proposal for Brain-Based Legal Sex*, 9 HARV. L. & POL’Y REV. 241–75 (2015).

Recognizing increased public awareness and legal recognition of transgender and intersex people, Vanderhorst notes that the legal definition of sex plays a critical role in determining whether and how individuals may participate in society, from shopping to travel to marriage. Vanderhorst recognizes that, among the United States, there is neither unity nor a clear standard as to how sex is defined, which raises issues for intersex and transgender people. To solve this problem, Vanderhorst advocates for a “neurological sex” standard, defining sex as one’s gender identity.

Wenstrom, Kristin, “*What the Birth Certificate Shows*”: *An Argument to Remove Surgical Requirements from Birth Certificate Amendment Policies*, 17 LAW & SEXUALITY 131–61 (2008).

In 2006, the New York City Department of Health and Mental Hygiene withdrew a proposed policy amendment that would have allowed for the correction of gender markers on birth certificates without also requiring surgical intervention. Wenstrom provides historical background on the development of the existing policy, the development of the proposed amendment, and a thoughtful critique of the reasons proffered by the Department of Health for the withdrawal of the proposed policy amendment. The language of the proposed amendment is included as an appendix.

Primary Sources

Obergefell v. Hodges, 135 S. Ct. 2584 (2015)

Defense of Marriage Act, Publ. L. 104-199, 110 Stat. 2419 (1996), codified at 28 USC §§ 1731, 1738C

Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010)

REAL ID Act of 2005, Pub. L. No. 109-13, Division B, 119 Stat. 231 (2005) (codified in scattered sections of 8 U.S.C. & 49 U.S.C.), 8 U.S.C.A. § 178

Title IX, An Act to Amend the Higher Education Act of 1965, Pub. L. No. 92-318, 86 Stat. 235 (1972), codified at 20 U.S.C. §§ 1681–1688